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SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 582

PUBLIC VIEWS ON MAJOR RAIL CONSOLIDATIONS

PETITION OF BURLINGTON NORTHERN SANTA FE CORPORATION AND THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY FOR STAY PENDING JUDICIAL REVIEW

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PETITION FOR A STAY PENDING JUDICIAL REVIEW

Pursuant to Rule 1115.5 of the Board's Rules of Practice, 49 C.F.R. § 1115.5, Burlington Northern Santa Fe Corporation and The Burlington Northern and Santa Fe Railway Company (collectively, BNSF) hereby petition for a stay -- pending judicial review and prior to seeking, if necessary, a judicial stay pending that review -- of the Board's decision, issued under purported authority of 49 U.S.C. §§ 721(a) and 721(b)(4), to (a) impose a moratorium on "activity relating to any railroad transaction that would be characterized as a major transaction under 49 CFR 1180.2, pending development of new rules by the Board,"[1] (b) refuse to accept filings related to such a transaction for 15 months, and (c) suspend the "Notice of Intent to File" filed in STB Finance Docket No. 33842 pending development by the Board of new merger rules. *Public Views on Major Rail Consolidations*, STB Ex Parte No. 582, slip op. at 10 (served Mar. 17, 2000) (Decision).

The Board lacks the statutory authority to impose this 15-month moratorium on the filing of control applications and to suspend the Notice of Intent. Furthermore, the Decision would directly and adversely affect BNSF's proposed combination with Canadian National Railway Company (CN). If the Board does not stay the Decision, the public benefits of the BNSF/CN transaction, which could be in excess of $500 million annually, will at best be delayed for the entire period of the moratorium. At worst, the benefits will be lost forever, because delay may constitute denial of the proposed transaction. On the other hand, if the Board enters a stay, reinstates the BNSF/CN Notice of Intent, and goes forward with the proceeding in the ordinary course, the Board will not be prevented from (a) responding to the service problems affecting other railroads, (b) reviewing any service problems the BNSF/CN combination allegedly would cause, or (c) addressing other issues, such as competition or public benefits, that may arise in the case. Furthermore, a stay will not prevent the Board from defending its moratorium order on full (and presumably expedited) judicial

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[1]/The direction "to suspend activity" could be read to prevent discussions with other carriers or other entities about potential transactions, the pursuit of judicial review of the Decision, or preparations necessary to enable BNSF to respond promptly in the event the Decision is stayed. This construction would make the Decision an overbroad and flagrantly unconstitutional prior restraint on the exercise of First Amendment rights, which in and of itself would justify a stay.

review, or from conditioning or denying the BNSF/CN common control application if the public interest so warrants.

Therefore, the Board should stay its Decision pending judicial review, granting BNSF its statutory rights to file the control application and to issuance by the Board of a merits decision no later than 16 months after BNSF and CN file that application.

ARGUMENT

A stay pending judicial review is justified under all four factors set out in *Market Dominance Determinations – Product and Geographic Competition*, STB Ex Parte No. 627, slip op. at 2 (served Feb. 23, 2000): (1) BNSF is likely to prevail on the merits of its petition for review; (2) BNSF will suffer irreparable injury in the absence of a stay; (3) any harm to other parties from a grant of a stay is not substantial and does not outweigh the irreparable injury to BNSF; and (4) the public interest strongly favors a stay.

I. BNSF IS LIKELY TO PREVAIL ON THE MERITS

The Board lacks the statutory authority to declare a moratorium applicable to pending mergers, under Sections 721(a) and 721(b)(4) or otherwise.[2] Moreover, even if the Board had such authority, it would have to provide notice and a meaningful opportunity to be heard before imposing such a generic moratorium, and then proceed through notice-and-comment rulemaking.[3]

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[2]Although BNSF cannot address these issues in full within the 10-page limit set for this motion, BNSF believes that the Decision also is unlawful because it is arbitrary and capricious, largely for the reasons set forth in filings by BNSF and CN on March 14; that it is unsupported by substantial evidence, particularly because the Board mischaracterized the statements of many participants, including Secretary of Transportation Slater, who opposed a moratorium; that it denies BNSF its Fifth Amendment right to due process in myriad ways, including the denial of a hearing on the to-be-filed common control application and entering an "injunction" without any legal briefing on the Board's statutory authority or the established standards for an "injunction" under 49 U.S.C. § 721(b)(4); that it constitutes a taking without just compensation in violation of the Fifth Amendment; that the Board unreasonably proposes to give the results of its new rulemaking retroactive effect so that they will govern the BNSF/CN transaction; that unlawful prejudgment of both the BNSF/CN common control application and the *Ex Parte No. 582* proceeding may have occurred; and that the Board undertook a major action without consideration of its effect on the environment, including delaying or denying the potential benefits of the BNSF/CN transaction, such as taking trucks off the roads, in violation of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321, *et seq.*

[3]By suspending the BNSF/CN Notice of Intent to File, the Board has effectively entered an injunction against

A. A Moratorium Cannot Be Lawfully Imposed Pursuant to 49 U.S.C. §§ 721(a) or 721(b)(4) and Is Inconsistent with the Consolidation and Merger Provisions of the ICC Termination Act of 1995

The Board's assertion that 49 U.S.C. § 721 provides statutory authority for its moratorium order is without merit.[4] First, Section 721(a) provides the Board only with authority to take actions that are "direct[ly] adjunct to [its] explicit statutory authority." *ICC v. American Trucking Ass'ns*, 467 U.S. 354, 365 (1984)(discussing 49 U.S.C. § 10321(a), the predecessor to Section 721(a)). The Board cannot use Section 721(a) to justify an action that is directly contrary to the statute's commands or that undermines the basic structure of the statute, and it therefore cannot use Section 721(a) to repeal the express statutory deadlines for reaching a merits decision on a complete merger application. *See also Central Forwarding, Inc. v. ICC*, 698 F.2d 1266, 1277 (5th Cir. 1983)(predecessor to Section 721(a) "grants considerable powers to enforce the substantive mandates of federal law * * * but is tied to and limited by those specific substantive provisions. It does not open whole new horizons on the regulatory landscape.").

Second, the Board's assertion that 49 U.S.C. § 721(b)(4) provides statutory authority for its decision to impose the moratorium similarly is without foundation. That section provides, in pertinent part:

> **(b) Inquiries, reports, and orders.** — The Board may —
>
> **(4)** when necessary to prevent irreparable harm, issue an appropriate order without regard to subchapter II of chapter 5 of title 5.

Orders under Section 721(b)(4) are akin to injunctions. *See DeBruce Grain, Inc. v. Union Pacific RR. Co.*, 149 F.3d 787, 788 (8th Cir. 1998). The Board itself has accepted that an injunction under Section 721(b)(4), like other injunctions, cannot be justified on a mere showing of "irreparable harm." *See DeBruce*

BNSF and CN. Before taking this action, the Board should have commenced an adjudicatory proceeding, in which evidence would have been taken and cross-examined on the factors ordinarily considered in injunctive proceedings. But the Board did none of that. Instead, it initiated *Ex Parte No. 582* with an order declaring "we intend no prejudgment of the yet-to-be-filed BNSF/CN application." *Public Views on Major Rail Consolidations*, STB Ex Parte No. 582, slip op. at 3 (served January 24, 2000).

[4] The Decision also cites several general statutory provisions, including 49 U.S.C. §§ 10101 and 11324. However, the purported source of the Board's authority to *act*, as compared to statements of the goals in the furtherance of which the Board should act, is Section 721.

Grain, Inc. v. Union Pac. R.R, STB Docket No. 42023, slip op. at 2-3 (served Apr. 27, 1998) *(DeBruce Grain II)*; *DeBruce Grain, Inc. v. Union Pac. R.R.. Co.*, STB Docket No. 42023, slip op. at 3 (served Dec. 22, 1997).

Section 721(b)(4) was clearly intended by Congress to have a narrow scope as the successor to 49 U.S.C. §§ 10707(c) and (d) (repealed), providing a substitute for the ICC's power to suspend rates. *See* H. Conf. Rep. 104-422, at 170, 1995 U.S.C.C.A.N. 855 ("To *replace* the prior power to suspend and investigate *rates* under former section 10707, the new Board is specifically empowered under Section 721(b)(4) to grant administrative injunctive relief to address *imminent threats of irreparable harm.*") (emphasis added). The Board's expansion of its authority under Section 721(b)(4) beyond Congressional intent is unsustainable and cannot support the Board's admittedly "unprecedented" (Decision at 10) moratorium order. Nor does the Board claim any form of "emergency" exists that would otherwise justify an order under Section 11123, 49 U.S.C. § 1123, or any other statutory provision.

Putting aside the fact that the Board has not even addressed all the elements required for injunctive relief, the Board's attempt to justify its moratorium as necessary to prevent irreparable harm is unavailing. In *DeBruce Grain II*, the Board held that an order under Section 721(b)(4) could not be justified by a shipper's claim that an order was needed to "provide a reasonable degree of certainty for planning." *Id.* at 4. The Board held that such a justification was "too speculative a reason for finding irreparable harm under 49 U.S.C. 721(b)(4)." *Id.* The Board went on to state that "[a] party requesting a stay [under Section 721(b)(4)] must show that the claimed injury is 'both certain and great.'" *Id.* The Decision does not satisfy these standards.

First, the Decision repeatedly cites the service problems of the rail industry. However, mere *hearing* of the BNSF/CN application will not threaten irreparable harm or certain and great injury to railroad service. While service problems have recently afflicted railroads other than BNSF and CN, there has not been and cannot be any showing that the mere *pendency* of the BNSF/CN application will contribute to further service problems. This will only happen if the executives of other railroads ignore their own problems *and* the Board

then fails to bring them to task. With respect to potential future service problems, under Decision No. 1A in the *BNSF/CN* proceeding, the Board has already announced its decision to review the downstream effects of the transaction.

Second, the Decision repeatedly refers to the Board's concerns over the issues that would be raised by "what likely will be the final round of restructuring." But even approval of the proposed BNSF/CN combination will not lead inexorably to a "duopoly" constructed from the four major east-west U.S. rail carriers. Thus, even if the Board were properly concerned about such a duopoly, consideration by the Board of the BNSF/CN application would not produce or cause a duopoly or any "certain and great" or irreparable injury, such as the Board has found necessary for an injunctive order under Section 721(b)(4).

The filing, acceptance, and review of the BNSF/CN application could not be deemed to constitute or precipitate an injury that is "both certain and great." *DeBruce Grain II* at 4. By the same token, nothing about the filing, acceptance and review of the application poses an "imminent threat[] of irreparable harm." H. R. Conf. Rep. 104-422, at 170, *supra* (describing purpose of injunctive authority under Section 721(b)(4)). Indeed, there is no conceivably reasonable basis under which the Board's moratorium on the filing, acceptance and review of the BNSF/CN application could be justified as necessary to prevent "irreparable harm." The uncertain prospects of future events – events that the Board could then address -- are, therefore, "speculative" and "remote" justifications of the very nature that the Board has rejected in the past.

The Board also cannot use Section 721(a) or 721(b)(4) to evade the specific statutory requirements of Sections 11324 and 11325 to process common control applications expeditiously. Sections 11324 and 11325 of the Interstate Commerce Commission Termination Act (ICCTA), 109 Stat. 803, 838-841, 49 U.S.C. §§ 11324-11325, as well as the Board's own precedents and regulations (*e.g.*, 49 C.F.R. § 1180.4(c)(7)(i)), make it clear that the Board is *required* by statute and regulation to *accept* complete consolidation, merger, or control applications, and then to observe specified procedures in handling those applications, and to conform to the statutory deadlines in rendering decisions about them. The courts have regularly condemned

agency efforts to evade such governing statutes and regulations. *See, e.g., MCI Telecom. Corp. v. AT&T*, 512 U.S. 218, 231–232 (1994) ("What we have here, in reality, is a fundamental revision of the statute * * *. That may be a good idea, but it was not the idea Congress enacted into law * * *."); *Canadian Pacific Railway v. STB*, 197 F.3d 1165, 1168 (D.C. Cir. 1999) (rejecting reliance on 49 U.S.C. § 721(b)(4) to support Board order inconsistent with governing precedent). Because the moratorium contravenes the plain language and intent of the statute and the Board's regulations, it will not enjoy any judicial deference and, in short, is unsustainable. *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-845 (1984).

B. In Imposing the Moratorium, the STB Amended its Regulations Without Undertaking the Necessary Rulemaking Proceeding

Section 721 cannot support the Decision. Furthermore, even if the STB's moratorium could, somehow, be squared with the plain language and purposes of 49 U.S.C. §§ 11324 and 11325, it nevertheless would be invalid because it is a *de facto* amendment or rescission of the Board's regulations, applied retroactively to prevent the filing of an application by existing applicants and a subsequent decision on the merits by the Board. "Once a rule is final, an agency can amend it only through a new rulemaking." *Columbia Falls Aluminum Co. v. EPA*, 139 F.3d 914, 919 (D.C. Cir. 1998).

The STB's regulations provide for a "prefiling notification," 49 C.F.R. § 1180.4(b), and require the Board to accept a complete application within 30 days of its filing. 49 C.F.R. § 1180.4(c)(7)(i). By permitting the agency to reject as-yet unfiled applications without regard to whether they are "complete" under statutory and regulatory requirements, the moratorium effects an amendment of 49 C.F.R. § 1180.4(c)(7)(i) without resort to the prescribed procedures for rulemaking.[5]

Lacking any notice that the Board could or would shut down its application process after the prefiling notification was noticed by the Board, BNSF expended significant resources developing its application to conform to the requirements of Part 1180. If the moratorium is not stayed, most (if not all) of these

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[5]Because the rules announced in the Decision substantially affect BNSF's rights and interests, they are "substantive" and therefore subject to the APA's notice and comment requirements. *See, e.g., Chamber of Commerce of the United States v. United States Dep't of Labor*, 174 F.3d 206, 212 (D.C. Cir. 1999).

substantial expenditures on the application and related materials would be lost, even if, ultimately, BNSF and CN were permitted to file a new application after the termination of the moratorium. After all, as the courts have recognized in similar contexts, "neither time nor the [agency] nor petitioners' competitors" will have "stood still" in the intervening period. *McElroy Electronics Corp. v. FCC*, 990 F.2d 1351, 1358 (D.C. Cir. 1993). Because the moratorium constitutes an unanticipated change, without notice and comment, in the agency's rules governing prefiling notification and the acceptance of complete applications, the moratorium is improper and should be stayed by the Board. *See Alaska Professional Hunters Ass'n v. FAA*, 177 F.3d 1030 (D.C. Cir. 1999).

II. BNSF AND THE PUBLIC INTEREST WILL SUFFER IRREPARABLE INJURY IF A STAY OF THE DECISION IS NOT GRANTED

Even if Section 721(b)(4) could be used to override the explicit statutory provisions governing the handling of rail mergers, it could not be properly invoked absent a showing that the Decision was necessary to prevent irreparable injury or harm to cognizable interests. As discussed below, the Decision cannot remotely be justified as necessary or appropriate to prevent such harm to others. What ***is*** clear, however, is that the Decision will cause irreparable harm to BNSF and the public interest and cannot remotely be justified as necessary or appropriate to prevent such harm to others.

All BNSF seeks by this petition is the right to file its application and then have its merits determined by the Board, pending judicial review of the merits of the moratorium imposed by the Decision. The STB's substantive review of the application, subject only to post-decisional judicial review in the ordinary course, would be untouched by a grant of this stay petition. What the decision on this stay petition ***will*** determine, however, is whether BNSF must wait 15 months or longer before its common control application with CN even has a chance to be ***filed***. The many months in limbo that BNSF will have to endure, if a stay is not granted by the Board or the reviewing court, constitute irreparable injury — to the public interest as well as to BNSF.

BNSF has publicly estimated that its combination with CN will yield $500-$600 million in ***annual*** benefits, both public and private. BNSF does not expect the Board to accept these benefits as proven at this

time. But BNSF ***does*** respectfully suggest that this Board must recognize at least the ***possibility*** that those benefits will be real. Yet, until the moratorium expires, the control case, which is the adversary process by which those claims of benefits should be tested, will never even commence, and at least a year's worth of potential benefits will be lost forever.

History shows that mergers and common control transactions, in the railroad industry and otherwise, ***do*** yield public benefits. What none of this proves, of course, is that any ***particular*** merger yields public benefits that outweigh its costs. ***But that is precisely the point.*** Only a full evidentiary proceeding before the Board can meaningfully address that question. Further, in today's economy, it is folly to treat delay as costless. The D.C. Circuit observed in overturning a moratorium improperly imposed by a different agency:

> "[I]t is worth noting what is at stake here. * * * An observer uninitiated in the * * * process might respond, 'Big deal. They can just refile.' It is not that easy. Neither time nor the [agency] nor petitioners' competitors have stood still in the roughly four years since petitioners filed the disputed applications." *McElroy Electronics,* 990 F.2d at 1358.

The Board's March 17 Decision suggests that until its rulemaking is completed, "[t]o go forward with any individual merger proceeding * * * would be unfair to customers, carriers, employees, and affected communities, and would disrupt and distract the industry to the detriment of all the public interest concerns that we are charged with advancing." Decision at 9. Whether viewed as a conclusion of law or a determination on the relative benefits and risks of proceeding with the BNSF/CN application, it is neither logical nor lawful for the Board to deny BNSF and CN their statutory right to file a complete merger application, and have it processed according to statutory time limits, just because a simultaneous rulemaking would create some uncertainty. Almost all of the issues the Board proposes to address in its rulemaking, *see, e.g.,* Decision at 6, are issues that have been addressed in the past through adjudication, and the Board can address them here through adjudication, with or without a simultaneous rulemaking. Because the Board can depart from its adjudicatory precedents if it has a sufficient reason to do so and adequately explains its departure, *see Clinton Memorial Hosp.* v. *Shalala,* 10 F.3d 854, 859 (D.C. Cir. 1993), every common control proceeding involves a risk that the Board will respond to well-reasoned pleas to change standards. And there

is absolutely no legal prohibition on conducting control cases while simultaneously conducting a rulemaking addressing the very same subjects. Certainly, nothing about the initiation of rulemaking disables the Board from following Congress's commands in 49 U.S.C. §§ 11324 and 11325 to accept and promptly process common control applications.

For these reasons, it is abundantly clear that BNSF — and, more importantly, the public interest — will be harmed by any substantial delay in the Board's ***consideration*** of the BNSF/CN common control application. Again, it is open to the STB (subject to judicial review) to conclude at the end of the common control proceeding that the BNSF/CN transaction does not promise public benefits that outweigh its costs, but there is ***no*** justification for prejudging that issue. The public interest and the interest in avoiding irreparable harm to BNSF support the issuance of a stay.

III. A GRANT OF A STAY WILL NOT HARM OTHER PARTIES

The grant of a stay will not result automatically in the grant of the BNSF/CN common control application. Indeed, it will not even result automatically in a ***decision*** on that application, since the possibility remains that a reviewing court could sustain the Board's moratorium order after full judicial review. Any such decision by a reviewing court could easily be reached during the year-long (or longer) pendency of the application before the STB (following the grant of a stay).

In these circumstances, it is difficult to see how anyone could plausibly suggest that ***any*** cognizable harm will result from the grant of a stay. At most, the Board and interested parties could contend that they will have to put time and effort into the BNSF/CN common control proceeding if a stay is granted. But "[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *Renegotiation Bd.* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974); *accord FTC* v. *Standard Oil Co.*, 449 U.S. 232, 244 (1980); *Alabama Power Co.* v. *FERC*, 993 F.2d 1557, 1567 n.5 (D.C. Cir. 1993); *Market Dominance Determinations — Product and Geographic Competition* at 3. Review of the application will not contribute to the service problems of other railroads, unless those other railroads ***elect*** not to devote their full resources to solving those problems. Mere consideration of the BNSF/CN application by the Board will

not adversely affect any employee. Furthermore, there is no credible evidence that the financial strength of the rail industry will be harmed by Board consideration of the BNSF/CN application. The Board itself has recognized that threats of irreparable harm to other parties must be concrete and imminent, and the Decision does not satisfy this standard.

In short, the balancing of the equities is unusually clear in this case: the grant of a stay will allow BNSF's application at least a chance to be ***considered*** on the merits, to the potential benefit of both the public and BNSF, but will impose no cognizable harm at all on other parties. In such circumstances, even a "serious legal question" on the merits will warrant a stay. *Washington Metropolitan Area Transit Comm'n v. Holiday Tours*, 559 F.2d 841, 844 (D.C. Cir. 1977). Here, BNSF has shown more: a likelihood of success on the merits. A stay therefore should be granted by the Board.

CONCLUSION

For the foregoing reasons, the Board should stay its Decision pending judicial review and, upon filing by BNSF and CN of their application, reach a merits decision within the 16 month period prescribed by statute.

Respectfully submitted,

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